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in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

NO. 73-151

JULIO FUENTES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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OCTOBER TERM, 1973

NO. _____

JULIO FUENTES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 UNITED STATES CODE, SECTION 1254(1)

The petitioner, JULIO FUENTES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 4, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 4, 1973. A timely petition for rehearing and rehearing en banc was denied on June 21, 1973. Upon petitioner's motion, the issuance of the mandate was stayed by the Court of Appeals to and including July 21, 1973.[1] This petition is timely. This Court's jurisdiction is invoked under 28 United States Code Section 1254(1).

[1]The Court of Appeals decision affirmed the convictions of several persons, including Fuentes. However only Fuentes' motion to stay the issuance of the mandate was granted. Only he raised the issue of the validity of an indictment based upon no evidence.

QUESTIONS PRESENTED FOR REVIEW

I.

MAY A DEFENDANT IN A FEDERAL CRIMINAL CASE BE REQUIRED TO STAND TRIAL AND A CONVICTION BE SUSTAINED WHERE NO EVIDENCE ESTABLISHING PROBABLE CAUSE WAS PRESENTED TO THE GRAND JURY WHICH INDICTED HIM?

II.

DOES THE FIFTH AMENDMENT GUARANTY THAT NO PERSON SHALL BE HELD TO ANSWER FOR A CRIME UNLESS ON AN INDICTMENT OF A GRAND JURY, PERMIT AN INDICTMENT TO BE BASED UPON HEARSAY TESTIMONY WHEN DIRECT TESTIMONY WAS READILY AVAILABLE AND THE GRAND JURY WAS MISLED INTO THINKING IT WAS RECEIVING DIRECT TESTIMONY?

III.

EVEN IF THE FIFTH AMENDMENT WOULD NOT BE VIOLATED BY AN INDICTMENT BASED UPON HEARSAY TESTIMONY WHEN DIRECT TESTIMONY WAS READILY AVAILABLE AND THE GRAND JURY WAS MISLED INTO THINKING IT WAS RECEIVING DIRECT TESTIMONY, SHOULD THE SUPREME COURT SET FORTH A SUPERVISORY RULE PREVENTING SUCH PROSECUTORIAL MANIPULATION OF GRAND JURY PROCEEDINGS?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 6, 1971, JULIO FUENTES was indicted by a grand jury in the Southern District of Florida on two counts of violating Interstate Transportation of Stolen Motor Vehicle Statutes, Title 18 United States Code Sections 2312 and 2313, and one count of conspiracy to violate said statutes. He was one of forty (40) people indicted. The indictment contained forty (40) counts. FUENTES was named in three counts.

The sole testimony presented to the grand jury came from one government agent. The only testimony relating to FUENTES was:

"Q. Let me ask you this. What was the role of Mario Ferrer and Julio Fuentes?

A. They were car dealers. They were partners. They bought this car for $1,400.00. It's worth about $2,400.00. The car had previously been painted by Mouriz, and where the serial numbers were changed, and Felix Aleman disposed of the car as he had done with the other cars, and he transported the car from Dave's Auto Parts where it had been purchased from David Danovitz and Phillip Cannella.

Q. Did they ship that car to Puerto Rico?

A. Yes, they did and we verified the theft and recovered the car."

The agent's recitation was based on hearsay. The court below found that direct testimony was available. In addition, the prosecutor had provided the government agent,

and each of the grand jurors, with a copy of a previously prepared indictment. Throughout the grand jury proceedings, the agent testified from the indictment using hearsay and summary type evidence.

FUENTES moved to dismiss the indictment. The motion was denied. The trial court granted FUENTES a judgment of acquittal on the conspiracy count and convicted him on the two remaining counts. He was sentenced to three (3) years probation on one count and six (6) months imprisonment on the other.

An appeal to the Fifth Circuit followed on behalf of FUENTES and four other defendants who were also convicted. In that appeal FUENTES raised the three issues presented here. In his petition for rehearing he reiterated the claim that the failure to establish probable cause rendered the indictment and conviction invalid.

The Fifth Circuit opinion did not address that claim. The petition for rehearing reiterating the claim was denied. The motion to stay issuance of the mandate pending this petition again raised the issue that no evidence establishing probable cause was presented to the grand jury. The motion was granted.

The petitioner is at liberty upon a Five-Thousand ($5,000.00) Dollar appeal bond set by the trial court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT MUST BE SETTLED BY THIS COURT, AND CONFLICTS WITH THE IMPLICIT HOLDING OF *COSTELLO vs. UNITED STATES*, 350 U.S. 359 (1956).

No case has directly confronted the issue of the validity of an indictment returned by a grand jury which received no evidence establishing probable cause.

Last term the court reaffirmed the principle that one of the functions of a grand jury is to determine "if there is probable cause to believe that a crime has been committed." *Branzburg vs. Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 643 (1972).

In *Costello vs. United States*, 350 U.S. 359 (1956), the court implied that evidence presented to a grand jury must establish probable cause in order to sustain an indictment. Justice Burton, concurring in *Costello*, wrote:

> "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown *that the grand jury had before it not substantial evidence upon which to base its indictment, that indictment should be quashed.* To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Id. at 364. (emphasis supplied)

This case presents a stark test of the importance of the Fifth Amendment guaranty that no person *shall be held to answer* unless on an indictment of a grand jury. The fact that FUENTES was convicted does not denigrate his claim. For nearly a hundred years it has been established that a conviction obtained after indictment by an illegally constituted grand jury is invalid. *Strauder vs. West Virginia*, 100 U.S. 303 (1880); *Alexander vs. Louisiana*, 405 U.S. 625, 628 (1972). A conviction obtained upon an empty indictment is equally invalid, *United States v. Estepa*, 471 F.2d 1132 (2d Cir., 1972). To hold otherwise would be to undermine the integrity of this Fifth Amendment guaranty.

The function of a grand jury is to stand between the prosecutor and the accused. Present day practices have eroded that function. Unless this court requires that evidence establishing probable cause be presented to a grand jury as a predicate for indictment, this erosion will continue.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND PRESENTS A SERIOUS QUESTION IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

The Second Circuit has ruled that an indictment based upon hearsay will be dismissed if: (1) Direct testimony was available; (2) It was not inconvenient for the government to use that testimony and (3) The grand jury was misled into thinking it was getting direct testimony *or* there was a high probability that with eye-witness rather than hearsay testimony, the grand jury would not have

indicted. *United States vs. Liebowitz*, 420 F.2d 39 (2d Cir., 1969); *United States vs. Arcuri*, 282 F.Supp. 347, 351 (E.D. N.Y., 1969), affirmed 405 F.2d 691 (2d Cir., 1968). In *United States vs. Estepa*, 471 F.2d 1132 (2d Cir., 1972), the court reversed judgments of conviction and dismissed indictments because of the presentation of hearsay evidence to the grand jury.

The opinion below expressly rejected the Second Circuit decisions.[2] No other Circuit has adopted the Second Circuit position. Except for the Second Circuit, the Courts of Appeals have interpreted the broad language of *Costello vs. United States*, 350 U.S. 359 (1956), to mean that an indictment is an inviolable instrument.

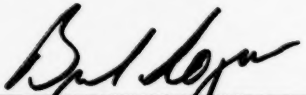
Thus the Fifth Amendment guaranty of indictment means one thing in Connecticut, New York and Vermont, and something less in the rest of the United States. Petitioner respectfully suggests that this Court should set one standard to govern the federal courts of the Nation.

[2]In footnote four of the opinion below, the court attempted to blunt it's rejection by saying that "The present case would not qualify even under the Second Circuit's 'best evidence' rule." That passing comment is inapplicable to Fuentes. The quoted portion of the grand jury testimony (p. 5 supra) and the complete grand jury testimony shows that the presentation of hearsay was misleading as to Fuentes.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of July, 1973, three copies of the Petition for Writ of Certiorari in this cause were served by United States Mail upon the HONORABLE ERWIN GRISWOLD, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

BRUCE S. ROGOW

APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1301

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

NELSON CRUZ, PEDRO MANUEL NORIEGA, JULIO FUENTES, FELIX ALEMAN and LUIS LARA,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(May 4, 1973)

Before AINSWORTH, GODBOLD and CLARK,
Circuit Judges.

CLARK, Circuit Judge: This case involves a large-scale car theft ring which conducted operations in New Jersey and Florida. Challenges are raised to (1) indictment solely on the basis of hearsay, (2) destruction of investigators' notes assertedly designed to thwart the Jencks Act, (3) alleged prejudice resulting from variance between the indictment and proof, misjoinder, and failure to sever,

and (4) arrangements between the prosecution and government witnesses. Concluding that the appellants received a fair trial free of prejudice and reversible error, we affirm all convictions challenged on this appeal.

Originally there were forty defendants variously charged in thirty-nine substantive counts of interstate car theft[1] and one overall conspiracy count.[2] Sixteen of these defendants pled guilty, charges against seven others were dismissed, two were acquitted in separate trials, and one remains a fugitive from justice. Fourteen others were tried before the United States District Court sitting without a jury. Eight of the fourteen who went to trial were acquitted. The instant appeal is by five of those found guilty. Three appellants, Cruz, Noriega, and Aleman, were found guilty of conspiracy and on one or more substantive counts; appellant Lara was found guilty of conspiracy but acquitted on four substantive counts; appellant Fuentes was acquitted of conspiracy but found guilty on two substantive counts.

Grand Jury Hearsay

The appellants contend that their grand jury indictment was invalid because it was based on the hearsay testimony of one investigating FBI officer rather than on direct testimony of informant-witnesses whom the government could have summoned to testify. In Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), the Court considered and rejected the contention that an

[1]Separate violations of 18 U.S.C. § 2312 and 18 U.S.C. §2313 were charged in regard to 19 vehicles, and a violation of 18 U.S.C. §2313 in regard to a twentieth.

[2]18 U.S.C. §371.

indictment based exclusively on hearsay evidence is constitutionally invalid. This reasoning has been followed on many occasions by this court. See, e.g., United States v. Bird, 456 F.2d 1023 (5th Cir. 1972); United States v. Klaes, 453 F.2d 1375 (5th Cir. 1972); United States v. Howard, 433 F.2d 1 (5th Cir. 1970), cert. denied, 401 U.S. 918, 91 S.Ct. 900, 27 L.Ed.2d 819 (1971).

Recognizing the piercing precedent of Costello, the appellants would avoid its thrust by distinguishing the facts of this case. First, they refer us to opinions of the Second Circuit which they contend establish the rule that an indictment based on hearsay is invalid where (1) non-hearsay evidence is readily available; (2) the grand jury is misled into believing it was hearing direct testimony rather than hearsay; and (3) there is a high probability that had the grand jury heard the eye witnesses it would not have indicted. See United States v. Umans, 368 F.2d 725 (2d Cir. 1966) (dicta), cert. granted, 386 U.S. 940, 87 S.Ct. 975, 17 L.Ed.2d 872, cert. dismissed as improvidently granted, 389 U.S. 80, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967); United States v. Malofsky, 388 F.2d 288 (2d Cir.) (dicta), cert. denied, 390 U.S. 1017, 88 S.Ct. 1273, 20 L.Ed.2d 168 (1968); United States v. Liebowitz, 420 F.2d 39, 41-42 (2d Cir. 1969),[3] However, this "best evidence" rule has never been considered, even by that circuit, as a constitutional requirement. United States v. Callahan, 439 F.2d 852, 859-60 (2d Cir.) cert. denied 404 U.S. 826, 92 S.Ct. 56, 30 L.Ed.2d 54 (1971). Rather, it serves simply as a

[3]See also United States v. Beltram, 338 F.2d 449, 451 (2d Cir.) (Medina, J., dissenting), cert. denied, 390 U.S. 1017, 88 S.Ct. 1273, 20 L.Ed.2d 168, and 391 U.S. 955, 88 S.Ct. 1860, 20 L.Ed.2d 869 (1968); United States v. Payton, 363 F.2d 996, 999 (2d Cir.) (Friendly, J., dissenting), cert. denied, 385 U.S. 993, 87 S.Ct. 606, 17 L.Ed.2d 453 (1966).

supervisory guideline to be employed by courts within their sound discretion to protect potentially innocent citizens from possible prosecutorial manipulation of grand jury proceedings. United States v. Estepa, 471 F.2d 1132, 1136-1137 (2d Cir. 1972). See also United States v. Gramolini, 301 F.2d 39 (D. R.I. 1969); United States v. Arcuri, 282 F.Supp. 347 (S.D. N.Y.) aff'd 405 F.2d 691 (2d Cir. 1968) cert. denied, 395 U.S. 913, 89 S.Ct. 1760, 23 L.Ed.2d 227 (1969). While the presentation of hearsay testimony of an investigating officer in lieu of readily available testimony by direct witnesses is by no means a preferred procedure, it is neither unconstitutional nor inherently wrong. In the absence of some showing that the integrity of grand jury proceedings has been impaired, an indictment even if based exclusively on such testimony will not be overturned on appeal.[4]

Secondly, the appellants argue that the 1970 amendment to the Jencks Act, contained in the Organized Crime Control Act, P.L. 91-452, §102, codified as 18 U.S.C. §3500 (e) (3), which expressly placed grand jury testimony within the definition of statements subject to discovery for the purposes of impeachment, undermines the continuing validity of Costello. They contend that since criminal defendants now have the right to obtain grand jury minutes containing testimony of government witnesses who later appear at trial, refusal of the government to call before the grand jury available witnesses who can testify directly to the

[4] The present case would not qualify even under the Second Circuit's "best evidence" rule. While it is undisputed that the government could have produced before the grand jury the same informant-witnesses who appeared at trial, it is clear that the grand jury was fully aware that the FBI agent who testified was relating, not personal experiences, but evidence which he had received second-hand from informants, and there is little doubt that if the informant-witnesses had appeared in person, the grand jury would have indicted these appellants.

facts of the alleged offense and whom the government plans to call at trial unfairly denies the defense potential Jencks Act material.

The appellants suggest that, in order to effectuate the Congressional policy reflected in the 1970 amendment, the courts should overturn indictments obtained through hearsay testimony. This suggestion misreads the legislative purpose for these amendments which is to undergird the truth finding process of criminal trials by making any existing prior statements made by a witness used by the government equally available to the defense and prosecution. However, no part of the Jencks Act has ever been construed to require the government to develop potential Jencks Act statements so that such materials can be combed in the hopes of obtaining impeaching inconsistencies.[5] Indeed, we have held "[t]he right of discovery of statements is not a guarantee that the statement is complete in all respects." Castillo v. United States, 409 F.2d 762, 765 (5th Cir. 1969). In an analogous area, we have also unequivocally refused to require the holding of preliminary examination under Fed.R.Crim.P. 5(c) in the face of assertions by defendants that it would benefit the development of their defense to have this pretrial insight to the government's proof and that the government had deliberately aborted such an examination by continuance until an indictment was obtained.[6] United States v. Coley, 441 F.2d 1299, cert. denied,

[5]Cf. United States v. Payton, 363 F.2d 996, 999 (2d Cir.), cert. denied, 385 U.S. 993, 87 S.Ct. 606, 17 L.Ed.2d 453 (1966), which rejected an identical contention in respect to the limited right of discovery of grand jury minutes established in Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

[6]See 18 U.S.C. §3060(e).

404 U.S. 867, 92 S.Ct. 85, 30 L.Ed.2d 111 (1971). We conclude that Costello is unaffected by the recent amendment to the Jencks Act.[7]

Taking a different approach, the appellants argue that their indictments were invalid because the grand jury did not have before it any probative evidence, either hearsay or direct, upon which to base the indictments. However, the majority opinion in Costello also squarely rejected the contention that appellate courts may review the sufficiency of evidence supporting an indictment. 350 U.S. at 363, 76 S.Ct. at 408-409. The appellants' reliance on the concurring opinion of Mr. Justice Burton in Costello and on dicta in the pre-Costello opinion of this court, Friscia v. United States, 63 F.2d 977, 980, cert. denied, 289 U.S. 762, 53 S.Ct. 797, 77 L.Ed. 1505 (1933), is misplaced.[8] We will not review the sufficiency of the evidence, if any, supporting the grand jury indictments in this case. See Cohen v. United States, 363 F.2d 586 (5th Cir.), cert. denied, 403 U.S. 908, 91 S.Ct. 2215, 29 L.Ed.2d 684 (1971); United States v. Gower, 447 F.2d 187 (5th Cir.), cert. denied, 404 U.S. 850, 92 S.Ct. 84, 30 L.Ed.2d 88 (1971).

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[7]There is no suggestion that the failure to call informant-witnesses before the grand jury amounted to an intentional suppression of favorable evidence. Compare Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

[8]To the extent that language in Friscia and other decisions of this court, e.g., Grave v. United States, 4 F.2d 658, 660 (5th Cir.), cert. denied, 268 U.S. 702, 45 S.Ct. 637, 69 L.Ed. 1165 (1925); Shushan v. United States, 117 F.2d 110, 113 (5th Cir.), cert. denied, 313 U.S. 574, 61 S.Ct. 1085-86, 85 L.Ed. 1531-32 (1941), is inconsistent with the majority opinion in Costello, it, of course, stands overruled.

Witness Interviews and the Jencks Act

The appellants further contend that their rights under the Jencks Act were violated by the failure of the government to produce copies of statements made by government witnesses. As part of pre-trial investigation, FBI agents interviewed a number of persons involved in the car theft ring. During these interviews the agent took notes which were routinely destroyed after the agent had recorded his summary of the interview on a standard Form 302 report.[9] The appellants assert that the now destroyed notes contained substantially verbatim recitals of oral statements by prosecution witnesses and therefore that the government violated the Jencks Act by failing to preserve and produce such notes at trial.

This claim is based on statements made by the government's witnesses during cross-examination that they observed investigating officers make extensive notes during pre-trial interviews. Since the inspection of the original notes was impossible, the court and defense counsel conducted voir dire examination of the investigating agents and the witnesses who had been interviewed to determine whether the notes were such "statements" as would have been required to be produced under the Jencks Act.[10] In contradiction to testimony of the witnesses, the investigating officers testified that they did not take verbatim notes

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[9]The government voluntarily gave defense counsel 124 pages of Form 302 reports relating to testimony adduced against the fourteen defendants then on trial.

[10]This fact-finding procedure was approved by this court in United States v. Blackburn, 446 F.2d 1089, 1090 (5th Cir. 1971), cert. denied, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972); Matthews v. United States, 407 F.2d 1371, 1376 (5th Cir. 1969), cert. denied, 398 U.S. 968, 90 S.Ct. 2177-78, 26 L.Ed.2d 554 (1970).

and, at the most, jotted down occasional key words and phrases used by the informants. The court thereupon found that "the notes that were made were not substantially verbatim recitals," and therefore were not "statements" within the meaning of 18 U.S.C. §3500(e)(2).

The fact that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes Jencks Act material. United States v. Augenblick, 393 U.S. 348, 354-55, 89 S.Ct. 528, 533, 21 L.Ed.2d 537 (1969); Palermo v. United States, 360 U.S. 343, 351-53, 79 S.Ct. 1217, 1224-25, 3 L.Ed.2d 1287 (1959); United States v. Graves, 428 F.2d 196 (5th Cir.), cert. denied, 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269 (1970). Whether the investigators' notes in the present case contained more extensive recitations was a matter of fact to be decided by the court on the basis of conflicting testimony. Findings of fact in regard to the Jencks character of investigators' notes like other trial court findings of fact may not be disturbed unless they are clearly erroneous. See, e.g., Campbell v. United States, 373 U.S. 487, 493, 83 S.Ct. 1356, 1360, 10 L.Ed.2d 501 (1963); United States v. Bell, 457 F.2d 1231 (5th Cir. 1972). No error, let alone clear error, appears here.

Procedural Prejudice

a. Variance-Single vs. Multiple Conspiracies. Count I of the indictment charged that the numerous defendants were members of a single auto theft conspiracy. In a comment made at the time of passing judgment, the trial court stated that the proof showed that two conspiracies existed within the offense charged. The court stated that it found appellants Cruz, Noriega, and Aleman to be members of

one conspiracy operating primarily in the Miami area and appellants Cruz and Lara to be members of a similar and interrelated conspiracy centered in New Jersey. The appellants argue that these statements demonstrate a variance between the indictment and proof which requires reversal. In Berger v. United States, the Supreme Court rejected the contention that proof of multiple conspiracies automatically constitutes a fatal variance from a single offense as charged in the indictment:

> The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935). An additional function of the variance rule is to avoid the danger of a "transference of guilt from one to another across the line separating conspiracies." Kotteakos v. United States, 328 U.S. 750, 774, 66 S.Ct. 1239, 1952, 90 L.Ed. 1557 (1946).

Even in a jury trial, however, "prejudice is not assumed" simply from the fact that the proof shows multiple conspiracies, rather than a single conspiracy. Grissette v. United States, 313 F.2d 187, 188 (5th Cir. 1963). In the

present case, which was tried before the court without a jury, not only is there absolutely no evidence that the defendants were taken by surprise or that their substantial rights were otherwise prejudiced by proof which showed two separate but closely related conspiracies, but also the record makes it crystal clear from the opening remarks to the final judgments the trial court weighed and considered the evidence against each defendant on its merits without regard to any evidence against any other co-defendant. There is nothing in this case remotely similar to Kotteakos where confusion and error concerning the proof of plural conspiracies permeated the entirety of a jury trial for a single conspiracy. This case is controlled by the principles announced in Berger. See, e.g., Robinson v. United States, 333 F.2d 950 (5th Cir.), cert. denied, 379 U.S. 921, 85 S.Ct. 277, 13 L.Ed.2d 335 (1964); Jolley v. United States, 232 F.2d 83 (5th Cir. 1956).

b. Joinder and Severance. In a closely related argument the appellants contend that the finding of two conspiracies and the separate character of some of substantive counts made their initial joinder in the same indictment improper. This contention is also without merit. Defendants may be joined in a single indictment and trial together if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Once these conditions are satisfied, as they certainly were in the present indictment, it is "within the sound discretion of the trial judge as to whether the defendants should be tried together or separately."[11] Opper v. United States,

[11] Appellant Cruz of course was found guilty as a member of both conspiracies and would not have been entitled to a severance in any event Cf. United States v. Walker, 453 F.2d 1205 (5th Cir. 1972).

348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 S.Ct. 101 (1954); United States v. Lane, 465 F.2d 408, 413 (5th Cir. 1972); Tillman v. United States, 406 F.2d 930 (5th Cir.), vacated in part, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). The threshold for finding such discretion to have been abused by proceeding with a joint trial is especially high when the trial is to be to the court rather than a jury. The picture reflected by this record is one of a patient, perceptive, careful trier of fact who was fully aware of and zealously protected the individual rights of each and all of the parties.

Appellant Fuentes asserts that he should have been granted a severance after his partial directed verdict of acquittal at the conclusion of the government's case. Under Fed.R.Crim.P. 14 the court has a continuing duty during all stages of the trial to grant a severance if it becomes clear that continued joinder will result in prejudice to the defendant. Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 948, 4 L.Ed.2d 921 (1960). The fact that Fuentes, who was charged on only two substantive counts involving a single vehicle, was kept in the case along with eleven other defendants accused of large-scale conspiracy continuing over a three-year period, does not automatically constitute grounds for reversal. As with the defendants acquitted of conspiracy in Schaffer, Fuentes has failed to demonstrate any prejudice which resulted from the denial of his motion for severance.[12]

[12]The evidence against Fuentes was presented in a relatively short period and was easily isolatable. There is simply no merit to the suggestion that the court as the trier of fact was unable to segregate this evidence from that presented against the other defendants. Indeed, the acquittal of Fuentes' business partner, Mario Ferrer, demonstrates that the court was well able to keep the evidence against the various defendants in perspective.

Overall Fair Trial

Finally, appellants contend that the proceedings against them taken as a whole were unfair and constituted overreaching by federal prosecutorial authorities. The only individual point raised which has not been discussed above is the allegation that testimony of key government witnesses was procured by the payment of money, offers of immunity, and in one case an agreement not to revoke parole.

In cases involving well-organized criminal conspiracies the use of informant testimony by a co-conspirator is oft-times a necessity. There is, of course, a recognized danger that a witness whose continued liberty depends upon cooperation with autorities may be overly responsive. However, where there is no suggestion of entrapment,[13] the relationship between the witness and the prosecution goes only to the weight and credibility to be attributed to that witness's testimony and not to its admissibility. In the present case, the government fully revealed its arrangements with the informants in a Brady statement.[14] Thus informed of the arrangements between the government and its key witnesses, the court found the appellants guilty.

[13]Compare Williamson v. United States, 311 F.2d 111 (5th Cir. 1962).

[14]Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The terms of the agreement were that the informers would testify for the government in return for immunity from prosecution for past criminal activity. However, this immunity was conditional and could be removed if the appellants committed perjury or if the government learned that the witnesses had committed crimes other than those which they disclosed to investigators. The government also revealed that it had paid two of the informants a total of 1,450 dollars. However, these payments were made during the period of investigation, ostensibly to replace wages lost while assisting the government, and were not contingent on trial performance nor on conviction of the appellants.

There is no basis for differing with the court's judgment of the credibility of testimony presented to it.

The suggestion that the prosecution of the appellants was inherently unfair since other guilty parties escaped prosecution by cooperation is equally without merit. Assuming solely for the sake of argument that the government could be faulted by this court for making a testimonial bargain in a case such as this, we would find not the slightest reason to quibble with the agreements made here. The final result is that leaders of a large-scale auto theft ring have been convicted, either after guilty pleas or trial. The only party involved on this appeal who could claim to be a fringe party, Julio Fuentes, was fairly convicted for his role as a knowing retailer of stolen vehicles. The relatively light sentence imposed on him reflects the court's proper evaluation of the culpability of his offense.

We have separately and severally considered the various errors asserted and find them individually and collectively to be without merit. The judgment of the trial court is

AFFIRMED.

[TITLE OMITTED]

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(June 21, 1973)

Before AINSWORTH, GODBOLD and CLARK, Circuit Judges.

PER CURIAM: The Petitions for Rehearing filed on behalf of Fuentes and of Noriega, Aleman and Lara are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Filed June 29, 1973)

No. 72-1301

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

NELSON CRUZ, PEDRO MANUEL NORIEGA, JULIO FUENTES, FELIX ALEMAN, and LUIS LARA,
Defendants-Appellants.

ON CONSIDERATION OF THE APPLICATION of the Appellant, Julio Fuentes in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Julio Fuentes to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be, and the same is stayed to

and including July 21, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ Charles Clark

UNITED STATES CIRCUIT JUDGE

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-151

JULIO FUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5144

LUIS LARA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5162

FELIX ALEMAN AND PEDRO MANUEL NORIEGA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Southern District of Florida, petitioners

were convicted on various counts of having violated 18 U.S.C. 2312, 2313, and 371 in connection with a large auto-theft ring.[1] Petitioner Fuentes (No. 73–151) was convicted on two substantive counts, but acquitted on the conspiracy count; he was sentenced on one count to six months' imprisonment and on the other to three years' probation. Petitioner Lara (No. 73–5144) was found guilty on the conspiracy charge and acquitted on four substantive counts; he was sentenced to three years' imprisonment. Petitioners Aleman and Noriega (No. 73–5162) were each convicted of conspiracy and on six and four substantive counts, respectively; petitioner Aleman was sentenced to serve concurrent terms of eighteen months in prison, and petitioner Noriega received concurrent two-year sentences.

All petitioners contend that their indictment was invalid because the sole witness who appeared before the grand jury was an FBI agent whose testimony in substantial part summarized his interviews with informant-witnesses. In addition, petitioners Fuentes (No. 73–151) and Lara (No. 73–5144) argue that the evidence before the grand jury was in any event insufficient to support the indictment; the petitioners Aleman and Noriega (No. 73–5162) argue that the government destroyed "Jencks Act" material prior to trial so as to require dismissal under 18 U.S.C. 3500.

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[1] Forty defendants were originally charged in one conspiracy count and thirty-nine substantive counts. Charges against seven defendants were dismissed. Sixteen pleaded guilty, two were acquitted in separate trials, and one was a fugitive. Petitioners were tried jointly with ten others, eight of whom were acquitted.

The judgment of the court of appeals was entered on May 4, 1973, and petitions for rehearing were denied on June 21, 1973 (Fuentes Pet. App. 13–14). The petition in No. 73–5162 (Aleman and Noriega) was not filed until July 23, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court. Petitioner Lara is now a fugitive, having failed to report as ordered to commence service of his sentence (see App., *infra*, pp. 9–11). In these circumstances, this Court ordinarily will decline to grant relief. *Molinaro* v. *New Jersey*, 396 U.S. 365. In any event, all contentions of all petitioners are without merit.

The evidence at trial disclosed the operation of a large ring of car thieves who stole automobiles in Florida, New York, and New Jersey and transported them among those states and to Puerto Rico. Members of the ring customarily placed on the stolen vehicles identification plates taken from wrecked, similar automobiles which were then destroyed to prevent detection of the switched identification plates. They also repainted or otherwise disguised the stolen automobiles, which they then sold to innocent purchasers or retained for their own use.

1. All petitioners contend that they were brought to trial upon a constitutionally invalid indictment, since the sole witness presented to the grand jury was an FBI agent, Samuel McPheters, whose testimony summarized information he and other investigators had received, primarily from a number of informants who subsequently testified at petitioners' trial. Petitioners contend that the decision below, sustaining the indictment, is contrary to what they

perceive to be the "implicit holding" of *Costello* v. *United States*, 350 U.S. 359 (Fuentes Pet. 7; see Lara Pet. 5–6; Aleman and Noriega Pet. 9).

On the contrary, however, petitioners' assertion that a valid indictment may not be based upon hearsay evidence is fully answered in *Costello* v. *United States*, *supra*. In that case the grand jury heard testimony only from government investigators, who summarized evidence received from other sources without themselves having first-hand knowledge of the facts. The sources of the information were available to testify and were in fact called as witnesses at trial. *Id.* at 360–361. After pointing out that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act" (*id.* at 362), this Court held:

> An indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Id. at 363. Accordingly, "[n]either justice nor the concept of a fair trial" requires the Court to establish a rule permitting challenges to indictments based upon the sufficiency or competency of the evidence presented to the grand jury. *Id.* at 364. See also *Lawn* v. *United States*, 355 U.S. 339, 349–350. The rationale for this rule is obvious, since the grand jury is merely an accusatory stage of the proceeding, and petitioners' rights were protected by the full safe-

guards of the trial. Cf. *United States* v. *Blue*, 384 U.S. 251, 255 n. 3.[2]

2. All petitioners also contend, in substance, that the decision of the court below conflicts with certain Second Circuit rulings which, in the exercise of the court's supervisory power, have restricted the proper use of hearsay evidence to support an indictment. See *United States* v. *Estepa*, 471 F. 2d 1132, 1137 (C.A. 2). However, this case does not present a suitable occasion to review the Second Circuit's response to certain prosecutorial practices in particular types of cases arising within its jurisdiction, because the requisite conditions for application of the Second Circuit rule are not present here and there is no conflict between the result below and any decision of the Second Circuit. Thus, in *Estepa*, the Second Circuit ruled that an indictment may not be returned upon hearsay where direct evidence is available, if the grand jury is misled to believe the witness is testifying from his own knowledge, or if it is unlikely that an indictment would have been returned upon the presentation of eye-witness testimony. In the instant case the opinion of the court of appeals (Fuentes Pet. App. 4 n. 4) and the ruling of the district court (Lara Pet. App.; Tr. 2514–2515) establish that Agent McPheters advised the

[2] These precedents also dispose of the contentions of petitioners Fuentes and Lara that, apart from its hearsay nature, the weight of the evidence before the grand jury was insufficient to support their indictment.

grand jury that his information came from interviews with others, rather than from direct observation, and that the grand jury fully understood that the testimony was hearsay.[3] Nor has there been any showing that his testimony contained factual errors or that the grand jury otherwise might not have indicted these petitioners upon the informers' testimony.[4]

3. Petitioners Aleman and Noriega (No. 73–5162) contend that the government, prior to trial, destroyed written records of various statements made to FBI agents by government witnesses, thereby allegedly violating the Jencks Act, 18 U.S.C. 3500. This assertion is based on the fact that the FBI agents who interviewed government witnesses routinely destroyed their original notes after making up "302" reports of the interviews. The "302's" pertaining to petitioners were voluntarily turned over to defense counsel (Aleman and Noriega Pet. App. 7 n. 9). At trial, petitioners claimed that the original notes had contained substantially verbatim recitals by the witnesses, which were not reproduced in the "302's." After a lengthy

[3] Petitioner Lara also asserts that the trial judge questioned the sufficiency of the evidence before the grand jury to establish probable cause. The record discloses, however, that the court's concern was for other defendants not tried with petitioners (Lara Pet. App.; Tr. 2760–2766).

[4] All petitioners have in effect claimed that the Second Circuit rule is required as a matter of constitutional law under the Fifth Amendment, but even the Second Circuit has recognized that its restrictions on the use of hearsay to support an indictment are not constitutionally compelled, in light of *United States* v. *Costello*, *supra*, and are based only upon the court's exercise of its supervisory power. See *United States* v. *Estepa*, *supra*.

evidentiary hearing, the trial court concluded as a factual matter that the notes had not contained substantially verbatim transcriptions of the witnesses' words, although some phrases may have been quoted directly (Tr. 1406–1407).[5] As the court of appeals noted, this finding on disputed facts must stand unless clearly erroneous, and the court below found no error at all (Aleman and Noriega Pet. App. 8–9). Petitioners make no showing of error or prejudice to warrant further review of this concurrent factual finding of two courts. *United States* v. *Augenblick*, 393 U.S. 348, 354–355; see *United States* v. *Blackburn, supra; United States* v. *Lepiscopo*, 429 F. 2d 258, 260 (C.A. 5), certiorari denied, 400 U.S. 948.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

[5] On the basis of this finding, it is clear that the original notes would have not been subject to production under the Jencks Act, even if they had remained in existence at the time of trial. *United States* v. *Blackburn*, 446 F. 2d 1089 (C.A. 5), certiorari denied, 404 U.S. 1017.

APPENDIX

United States District Court, Southern District of Florida

No. 71-469-Cr-JE

[File, July 9, 1973, Joseph I. Bogart, Clerk, U.S. District Court, Southern District of Florida, Miami, Fla.]

AMENDED ORDER ON MANDATE

UNITED STATES OF AMERICA

v.

LUIS LARA

The Clerk of this Court having received and filed on the 2d day of July, 1973, the Mandate issued by the United States Court of Appeals for the Fifth Circuit on June 29, 1973, on the appeal taken by the defendant Luis Lara, herein, wherein the judgment of this Court was affirmed, it is therefore

Ordered and adjudged that the Mandate of the United States Court of Appeals for the Fifth Circuit be and the same is hereby made the order of this Court; and that the defendant Luis Lara surrender himself to the United States Marshal for this District on or before 9 o'clock A.M. on the 23 day of July, 1973, to begin serving the sentence imposed by this Court on February 24, 1972. It is further

Ordered and adjudged that if the defendant Luis Lara fails to surrender himself to the United States Marshal for this District on or before the above-mentioned date, that in such event the bond posted in this cause is to be estreated, and the Clerk shall issue a warrant for the arrest of the defendant Luis Lara forthwith.

Done and ordered at Miami, Florida, this 9 day of June, 1973.

JOE EATON,
United States District Judge.

United States District Court for the Southern District of Florida

No. 71-469-CR-JE

UNITED STATES OF AMERICA

v.

LUIS LARA

To[1] any United States Marshal or any other authorized officer:

You are hereby commanded to arrest Luis Lara and bring him forthwith before the United States District Court for the Southern District of Florida in the city of Miami for failing to report to the United States Marshal in Miami, Florida on July 23, 1973, as per the Court's Order entered July 9, 1973.

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[1] Insert designation of officer to whom the warrant is issued, e.g., "any United States Marshal or any other authorized officer"; or "United States Marshal for _____ District of _____"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

Done and ordered under my hand and seal this 1st day of August, 1973.

JOE EATON,
United States District Judge.

JOSEPH I. BOGART,
Clerk.

Dated at Miami, Florida, on August 1, 1973. Bail fixed at $---- no bail.

By: STUART H. O'HARA,
Deputy Clerk.

RETURN

District of *ss:*

Received the within warrant the day of 19 and executed same.

_____

By: _____

U.S. GOVERNMENT PRINTING OFFICE: 1973